

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

1. Agency/Subagency originating request	2. OMB control number b. <input type="checkbox"/> None a. _____ - _____
3. Type of information collection (<i>check one</i>) a. <input type="checkbox"/> New Collection b. <input type="checkbox"/> Revision of a currently approved collection c. <input type="checkbox"/> Extension of a currently approved collection d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired f. <input type="checkbox"/> Existing collection in use without an OMB control number For b-f, note Item A2 of Supporting Statement instructions	4. Type of review requested (<i>check one</i>) a. <input type="checkbox"/> Regular submission b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____ c. <input type="checkbox"/> Delegated 5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No 6. Requested expiration date a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____
7. Title	
8. Agency form number(s) (<i>if applicable</i>)	
9. Keywords	
10. Abstract	
11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>) a. <input type="checkbox"/> Individuals or households d. <input type="checkbox"/> Farms b. <input type="checkbox"/> Business or other for-profit e. <input type="checkbox"/> Federal Government c. <input type="checkbox"/> Not-for-profit institutions f. <input type="checkbox"/> State, Local or Tribal Government	12. Obligation to respond (<i>check one</i>) a. <input type="checkbox"/> Voluntary b. <input type="checkbox"/> Required to obtain or retain benefits c. <input type="checkbox"/> Mandatory
13. Annual recordkeeping and reporting burden a. Number of respondents _____ b. Total annual responses _____ 1. Percentage of these responses collected electronically _____ % c. Total annual hours requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____	14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>) a. Total annualized capital/startup costs _____ b. Total annual costs (O&M) _____ c. Total annualized cost requested _____ d. Current OMB inventory _____ e. Difference _____ f. Explanation of difference 1. Program change _____ 2. Adjustment _____
15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>) a. <input type="checkbox"/> Application for benefits e. <input type="checkbox"/> Program planning or management b. <input type="checkbox"/> Program evaluation f. <input type="checkbox"/> Research c. <input type="checkbox"/> General purpose statistics g. <input type="checkbox"/> Regulatory or compliance d. <input type="checkbox"/> Audit	16. Frequency of recordkeeping or reporting (<i>check all that apply</i>) a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure c. <input type="checkbox"/> Reporting 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____
17. Statistical methods Does this information collection employ statistical methods <input type="checkbox"/> Yes <input type="checkbox"/> No	18. Agency Contact (person who can best answer questions regarding the content of this submission) Name: _____ Phone: _____

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator or head of MB staff for L.O.s, or of the Director of a Program or Staff Office)	
Signature	Date
Signature of NOAA Clearance Officer	
Signature	Date

SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT SUBMISSION

Draft Policy for Evaluation of Conservation Efforts When Making Listing Decisions
February 25, 2000

Background

1. The Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 et seq.), specifies the process by which the National Marine Fisheries Service (Service) can list species as threatened or endangered. The ESA requires the Service, when considering whether to list a species, to take into account “those efforts, if any, being made by any State . . . or any political subdivision of a State . . . to protect such species.” Conservation efforts are often formalized in conservation agreements, conservation plans, management plans, or other similar documents and are often developed with the specific intent of making listing species as threatened or endangered unnecessary. Sometimes these agreements or plans are not fully implemented or their results are not fully achieved at the time the Service must make a listing decision. These agreements or plans sometimes rely on future voluntary participation by private landowners, as opposed to enacted protective legislation or regulations. When an agreement or plan has not been fully implemented, its results have not been fully achieved, or it relies on future voluntary conservation efforts, the Service must assess the likelihood that the efforts will be implemented and effective.

The development of an agreement or plan by a State or other entity is completely voluntary. When a State or other entity voluntarily decides to develop an agreement or plan with the specific intent of making listing the subject species unnecessary, the criteria identified in this policy can be construed as requirements placed on the development of such agreements or plans; the State or other entity must satisfy these criteria in order to obtain and retain the benefit they are seeking which is making listing of a species as threatened or endangered unnecessary. The development of an agreement, with the Services’ involvement, that has the specific intention of making listing unnecessary constitutes a new information collection. One of the criteria identified in this policy is that such agreements and plans contain a provision for monitoring and reporting the progress and results of implementation of conservation efforts. This criterion also constitutes a new information collection.

A. Justification

1. The development of conservation plans could prevent some species from becoming so imperiled that the only recourse is to add them to the list of threatened and endangered species under the Endangered Species Act. The purpose of this policy is to encourage such plans and to give applicants certainty about the standards a plan must meet in order to be considered acceptable by NMFS. This policy identifies criteria that a conservation effort must satisfy to ensure certainty of implementation and effectiveness and for the Service to determine whether a

conservation effort contributes to making listing a species unnecessary or contributes to forming a basis for listing a species as threatened rather than endangered. The Service developed this draft policy to ensure consistent and adequate evaluation of agreements and plans in making listing decisions and to help States and other entities develop agreements and plans that will be adequate to make listing species unnecessary.

In addition, conservation professionals have long considered monitoring and reporting to be an essential component of scientifically sound agreements and plans and currently incorporate monitoring and reporting into all agreements and plans. The Service included a criterion in this policy requiring agreements and plans to include monitoring and reporting provisions to ensure consistency with sound biological and conservation principles and for completeness. Monitoring is the mechanism for confirming success, detecting failure, and detecting changes in conditions requiring modifications to the agreement or plan or possibly emergency conservation efforts by the Service, States, or others. In addition, monitoring is sometimes incorporated in agreements or plans as part of implementation of experimental measures. Including provisions for monitoring and reporting is necessary to demonstrate that the conservation efforts are likely to be implemented and effective.

2. The responsibility for developing and submitting a plan is up to the entity that would like to benefit from the Service not listing a species. The criteria in the policy will be used by the Service to determine if implementation of the plan will likely result in making a listing unnecessary. This policy is necessary because the Service has not had any criteria for judging whether a plan will be implemented and will be effective. We have lost several recent court cases concerning conservation plans and several states have requested the Service to provide some certainty by publishing what criteria must be met in order for a conservation plan to contribute to making it unnecessary to list a species.

The responsibility for monitoring the progress and results of implementation of an agreement or plan is determined and agreed to during the development of the agreement or plan. In most cases, the State or other entity which is leading development of the agreement or plan will conduct the monitoring. However, specific efforts may be implemented and monitored by the Service, property owners, or other entities.

The nature of the monitoring and reporting component of an agreement or plan will vary according to the species addressed, land ownership, specific conservation efforts, expertise of participants, and other factors. Monitoring and reporting implementation of some efforts, such as the removal of a structural hazard to the species, may involve a single and simple task - documenting the removal of the hazard. Monitoring of other efforts may involve more complicated and/or time-consuming efforts; for example, monitoring habitat restoration efforts may involve conducting vegetation and species surveys annually for several years.

The information collected through monitoring is very valuable to the Service, the States and other entities implementing agreements and plans, and to others concerned about the welfare

of the species covered by the agreements and plans. Because the effectiveness of conservation efforts is determined through monitoring, monitoring is essential for improving future conservation efforts.

3. The Service does not require, but will accept plans and reports electronically. We have not developed a form to be used for submission of plans or reports. In the past, we have made plans and annual reports from states available through the Internet, and plan to continue this practice.

4. Developing and submitting an agreement is necessary in order for the Service to determine if it meets the criteria included in the policy. Monitoring individual agreements and plans is necessary because they are species- and site-specific. As a matter of practice, the Service, as well as the developer of an agreement or plan, ensure that there is no duplication of effort within an individual monitoring plan.

5. Although conservation efforts that are capable of making the listing of a species as threatened or endangered unnecessary are usually developed by States or other units of government, small businesses or small entities may develop agreements or plans or may agree to implement certain conservation efforts identified in a State agreement or plan. However, the burden for developing a plan or monitoring conservation efforts will be the same for small entities since the purpose of each plan and monitoring is to conserve a species so that it does not require the protections of the Endangered Species Act. The requirements announced in the policy are the minimum criteria for all efforts.

6. If a plan is not developed and submitted, the Service may not be able to verify that actions are being taken that will contribute to making a listing unnecessary. If monitoring is not conducted, the Service may not be able to verify that the conservation efforts are being implemented, or are effective. The Service may then determine that, based on the best available information, listing the species is warranted.

The Service does not require more monitoring than necessary to accomplish the objective of the plan, which is to be effective. If this level of effort was reduced, the agreement or plan would provide less certainty that the efforts will be effective.

7. The Service generally asks States and other entities to submit monitoring reports annually, since most monitoring consists of measuring annual vegetation growth or species population growth. In addition, many agreements and plans are funded on an annual basis; monitoring annual progress in implementation is most appropriate. However, the Service may ask the State or other entity to report certain accomplishments or conditions before the scheduled submittal of an annual report, such as completion of construction of a habitat feature, the increase in severity of a threat, the detection of a new threat, and other factors that may have important consequences for the conservation of the species.

The Service does not require States or other entities to retain monitoring reports or data. However, States and other entities generally consider monitoring reports and data as important for planning future conservation actions. Also, State law, regulations, or practices may require State agencies to retain records for auditing purposes.

The Service does not have authority to protect confidential information; all monitoring reports are available for public review. Sometimes a State may be concerned about releasing sensitive information such as species locations on private lands. However, if collecting and or reporting sensitive information is necessary for assessing the progress and results of implementation of the agreement or plan, and the State is unwilling or legally unable to collect and/or report this information, the Service may determine that the agreement or plan does not provide a high enough level of certainty that it will be implemented and effective and that, therefore, listing is warranted.

8. The Service has not yet consulted with outside entities to obtain their views on information collection associated with this policy. As stated above, monitoring and reporting the progress and results of implementation of conservation efforts is considered an essential component of scientifically sound agreements and plans by conservation professionals and are currently routinely incorporated in agreements and plans. The Service included a criterion in this policy requiring agreements and plans to include monitoring and reporting provisions to ensure consistency with sound biological and conservation principles and for completeness.

The public will be given an opportunity to comment on the information collection associated with this draft policy when it is published for public comment and review.

9. The Service does not provide payments or gifts to those submitting monitoring reports.

10. There is no specific statutory authority for providing assurances of confidentiality to those submitting monitoring reports.

11. The development of a plan as well as monitoring and reporting on implementation of a plan does not require answering any questions about a person's private life.

12. Since 1997, the Service has entered into three conservation agreements which at the time we determined contributed to removing the need to list the covered species as threatened or endangered. For purposes of this exercise, we will assume that at least one agreement will be developed annually with the intent of making listing unnecessary, and that at least every other one of these will be successful in making listing unnecessary, and in this case, the States or other entities who develop these agreements will carry through with their monitoring commitments in order to keep the covered species off the list. Therefore, we estimate that two successful agreements will be in place over the next three years.

The Service estimates the States and other entities will spend an average of 320 person-hours to complete each agreement or plan that has the intention of making listing unnecessary. This is a one-time burden for each agreement developed. Based on a rate of \$50 per hour, we estimate that the cost to a State or other entity to develop the agreement will average \$16,000. The burden to the estimated one entity that chooses to develop an agreement in a given year totals 320 hours. Therefore, the total cost of developing agreements to preclude listing under this policy is also \$16,000.

We further estimate that for the agreements that the States or other entities develop that are successful in precluding listing, they will spend an average of 160 hours to conduct the monitoring and 40 hours to prepare a report. Based on a rate of \$50 per hour, we estimate the cost to a State or other entity to conduct the monitoring and to prepare a report to average \$10,000. The annual burden to 2 States or other entities to complete monitoring and reporting totals 400 hours. The total cost of monitoring and reporting associated with this policy is, therefore, \$20,000.

Burden Estimates for Reporting Requirements for the Draft Policy for Evaluation of Conservation Efforts in Making Listing Decisions

Type of activity	Number	Average time required (hours)	Burden hours
Developing agreement with intent to preclude listing (one-time burden)	1	320	320
Monitoring (annual)	2	160	320
Report preparation (annual)	2	40	80
Total	5	520	720

The nature of the monitoring and reporting component of an agreement or plan will vary according to the species addressed, land ownership, specific conservation efforts, and other factors. Monitoring and reporting implementation of some efforts, such as the removal of a structural hazard to the species, may involve a single and simple task - documenting the removal

of the hazard. Monitoring of an agreement or plan which relies primarily on protection or preservation of an area of habitat may involve a simple site inspection to verify that the habitat has not been vandalized or otherwise adversely modified. Monitoring of other conservation efforts may involve more complicated and/or time-consuming efforts; for example, monitoring habitat restoration efforts may involve conducting vegetation and species surveys annually for several years. In addition, some species are easy to survey while others are difficult.

States and other entities often have management responsibility for the species which become the subject of agreements or plans. States and other entities routinely conduct monitoring and reporting of these species and conservation efforts for these species as a part of on-going management. In these cases, monitoring and reporting for purposes of compliance with this policy is not an added burden for the State or other entity.

13. We do not anticipate any costs to applicants beyond those described above except for copying and mailing plans and reports. We estimate that each plan will cost about \$50.00 for copying and mailing and each annual report will cost about \$50.00 for copying and mailing with a total annual cost of about \$150.00 (one plan and two reports).

14. The Service estimates it will take an average of 160 hours for the Service to review each agreement or plan. Therefore, the annual burden to the Service resulting from one entity submitting agreements or plans with the intention of precluding the need to list a species totals is also 160. The Service estimates it will take an average of 2 hours per report for the Service to review the monitoring information collected on the species. Therefore, the annual burden to the Service resulting from 2 entities reporting information totals 4 hours. The cost of this review is estimated at \$30.00 per hour, or a total of \$120.00.

15. This is a new clearance request, and therefore, a program change.

16. Depending on public interest, Publication of plans and reports may be made available through the Federal Register or the Internet.

17. Not applicable. The Service is not seeking a waiver from the requirement to display the expiration date of the OMB approval of the information collection.

18. Not applicable. There are no exceptions to the certification statement in item 19 of OMB 83-I.

B. Collection of Information Employing Statistical Methods:

There is no statistical sampling or other respondent selection involved in this process.

Billing Code 4310-55

DEPARTMENT OF THE INTERIOR

DEPARTMENT OF COMMERCE

RIN: 1018-AF55

NOAA, Commerce.

Listing Decisions

SUMMARY: We, the Fish and Wildlife Service (FWS) and the National Marine

conservation efforts when making listing decisions under the Endangered Species Act

efforts being made to protect a species, the policy identifies criteria we will use in

species as threatened or endangered unnecessary. The policy applies to conservation

or similar documents developed by Federal agencies, State and local governments,

DATES: Send your comments on the draft policy to us (see ADDRESSES section)

insert date 60 days from date of Federal Register publication

ADDRESSES: Send your comments on the draft policy to the Chief, Division of

ARLSQ), Washington, D.C. 20240. You may examine the comments we receive by

4401 North Fairfax Drive, Arlington, Virginia.

Endangered Species, U.S. Fish and Wildlife Service at the above address, telephone

Division, National Marine Fisheries Service, 1315 East-West Highway, 13th Floor,
Silver Spring, Maryland 20910, telephone 301/713-1401 or facsimile 301/713-0376.

SUPPLEMENTARY INFORMATION:

DRAFT POLICY

Policy Purpose

We have proposed this policy in order to ensure consistent and adequate evaluation of formalized conservation efforts (conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents) when making listing decisions under the Act. We have also proposed this policy to facilitate the development of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.

Policy Scope

This policy applies to our evaluation of all formalized conservation efforts when making listing decisions for species not listed, including findings on petitions to list species and decisions on whether to assign candidate status, to remove candidate

status, to issue proposed listing rules, and to finalize or withdraw proposed listing

specific intent to influence a listing decision and with or without the involvement of the

implementation and effectiveness of formalized conservation efforts that have not yet

effectiveness at the time of a listing decision. The criteria will be used to determine

unnecessary or contributes to forming a basis for listing a species as threatened rather

In many cases, conservation efforts affecting a particular species will have been

those cases, development of an agreement or plan, and an evaluation of its certainty of

implemented conservation efforts will be considered when we make a listing decision.

or the types of conservation efforts needed to make listing unnecessary. Also, the

agreements or when a conservation effort should be included in an agreement or plan.

effectiveness of formalized conservation efforts. Although the certainty of implementation and effectiveness of a conservation effort may be considered in determining the appropriateness of including the effort in an agreement or plan, no particular level of certainty must be provided in order to include the effort in an agreement or plan.

Definitions

“Adaptive management” is the process of monitoring the results of implemented conservation efforts, then adjusting those efforts according to what was learned.

“Agreements and plans” include conservation agreements, conservation plans, management plans, or similar documents approved by Federal agencies, State and local governments, Tribal governments, foreign governments, businesses, organizations, or individuals.

“Candidate species,” as defined by regulations at 50 CFR 424.02(b), means any species being considered for listing as an endangered or a threatened species, but not yet the subject of a proposed rule. However, the FWS includes as candidate species those species for which the FWS has sufficient information on file relative to status and threats to support issuance of proposed listing rules. The NMFS includes as

candidate species those species for which it has information indicating that listing may

rules may be lacking. The term “candidate species” used in this policy refers to those

“Conservation efforts,” for the purpose of this policy, are specific actions,

the status of a species. Conservation efforts may involve restoration, enhancement,

beneficial actions.

conservation agreement, conservation plan, management plan, or similar document.

Section 4(a)(1) of the Endangered Species Act of 1973, as amended (16

endangered because of any of the following five factors:

habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; and

(E) other natural or manmade factors affecting its continued existence.

Although this language focuses on impacts negatively affecting a species, section 4(b)(1)(A) requires us also to “tak[e] into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.” Read together, sections 4(a)(1) and 4(b)(1)(A) and our regulations at 50 C.F.R. section 424.11(f) require us to consider any State, local, or foreign laws, regulations, ordinances, programs, or other specific conservation measures that either positively or negatively affect a species’ status (i.e., efforts that create, exacerbate, reduce, or remove threats identified through the section 4(a)(1) analysis). The manner in which the section 4(a)(1) factors are framed supports this conclusion. Factor (D) for example -- “the inadequacy of existing regulatory mechanisms” -- indicates that we might find existing regulatory mechanisms adequate to justify a determination not to

list a species.

In addition, we construe the analysis required under section 4(a)(1), in conjunction with the directive in section 4(b)(1)(A), to authorize and require us to consider whether the actions of any other entity, in addition to actions of State or foreign governments, create, exacerbate, reduce, or remove threats to the species. Factor (E) in particular --any “manmade factors affecting [the species’] continued existence” -- requires us to consider the pertinent laws, regulations, programs, and other specific actions of any entity that either positively or negatively affect the species. Thus, the analysis outlined in section 4 requires us to consider any conservation efforts by State or local governments, foreign governments, Tribal governments, Federal agencies, businesses, organizations, or individuals that positively affect the species’ status.

Conservation efforts are often informal, such as when a property owner implements conservation measures for a species simply because of concern for the species or interest in protecting its habitat, and without any specific intent to affect a listing decision. Conservation efforts are also often formalized in conservation agreements, conservation plans, management plans, or similar documents. The development and implementation of such agreements and plans have been an effective mechanism for conserving declining species and have, in some instances, made listing unnecessary. These efforts are consistent with the Act’s finding that “encouraging the

States and other interested parties...to develop and maintain conservation programs...is a key...to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants" (16 U.S.C. 1531 (a)(5)).

In some situations, the listing process may be under way, and formalized conservation efforts have yet to be implemented. We may determine that a formalized conservation effort that has not yet been implemented reduces or removes a threat to a species when we have sufficient certainty that it will be implemented and effective.

Deciding or determining whether a species meets the definition of threatened or endangered requires us to make a prediction about the future persistence of a species. Central to this concept is a prediction of future conditions, including consideration of future negative effects of anticipated human actions. We cannot protect species without taking into account future threats that have a high likelihood of affecting a species. The Act does not require that, and species conservation would be compromised if we wait until a threat is actually harming individuals before we list the species as threatened or endangered. Similarly, the magnitude and/or severity of a threat may be reduced as a result of future positive human actions. Common to the consideration of both the effects of future negative human actions and the effects of future positive human actions is a determination of the certainty that the actions will occur and that their effects on the species will be realized. We therefore consider both future negative and future positive human impacts when assessing the status of the

species.

For example, if a State recently instituted a program to eliminate collection of a reptile being considered for listing, we must assess the predicted consequences of this program on the status of the species. For those parts of the program recently instituted, a record to determine the effect on the species may not yet exist. Therefore, we must base an assessment of the adequacy of the program on predicted compliance and effects. Such an assessment would reasonably include an evaluation of the State's ability to enforce new regulations, educate the public, monitor compliance, and monitor the effects of the program on the species. We would determine that the program reduces the threat of overutilization of the species through collecting if we found sufficient certainty that the program would be implemented and effective.

The language of the Act supports this approach. The definitions for both "endangered species" and "threatened species" contain references to future status, which indicates that consideration of whether a species should be listed depends in part on identification and evaluation of future actions that will reduce or remove, as well as create or exacerbate, threats to the species. In addition, the first factor in section 4(a)(1) -- the present *or threatened* destruction, modification, or curtailment of [the species'] habitat or range -- explicitly requires us to analyze both current actions affecting a species' habitat or range and those actions that are sufficiently certain to occur in the future and affect a species' habitat or range. However, future actions by

Federal agencies, States, Tribes, and private entities that create, exacerbate, reduce, or remove threats are not limited to actions affecting a species' habitat or range.

Congress did not intend for us to consider current and future actions affecting a species' habitat or range, yet ignore future actions that will influence overutilization, disease, predation, regulatory mechanisms, or other natural or manmade factors.

Therefore, we construe Congress' intent, as reflected by the language of the Act, to require us to consider both current actions that are affecting a species' status and sufficiently certain future actions -- either positive or negative -- that will affect habitat, range, overutilization, disease, predation, regulatory mechanisms, or other natural or manmade factors.

The consideration of both positive and negative effects of human actions in making a prediction about the future persistence of a species also requires consideration of voluntary human actions. The threats to species that lead to listing as threatened or endangered are often the result of voluntary human actions. For example, decisions to develop property, harvest timber, or otherwise use or manage land or other natural resources in ways that pose a threat to a species are typically voluntary, as opposed to mandatory, actions. We must factor the effects of these voluntary detrimental actions into our assessment. Similarly, decisions to forego development or other changes in land use or management that would pose a threat to a species, as well as decisions to initiate conservation efforts that will have a positive effect on the species, are often voluntary, as opposed to mandatory, actions.

Voluntary beneficial actions, whether initiated independently or through participation in a formalized conservation effort, must also be factored into our assessment.

For example, a State could have a voluntary incentive program for protection and restoration of riparian habitat that includes providing technical and financial assistance for fencing to exclude livestock. To assess the effectiveness of this voluntary program, we would evaluate the level of participation (e.g., number of participating landowners or number of stream-miles fenced), the length of the commitment by landowners, and effects of the program on the species. We would determine that the program reduces the threat of habitat loss and degradation if we find sufficient certainty that the program is effective.

Evaluation Criteria

Conservation agreements, conservation plans, management plans, and similar documents generally identify numerous conservation efforts (i.e., actions, activities, or programs) to benefit the species. In determining whether a formalized conservation effort contributes to making listing a species as threatened or endangered unnecessary or contributes to forming a basis for listing as threatened rather than endangered, we must evaluate whether the conservation effort affects the status of the species. Two factors are key in that evaluation: (1) For those efforts yet to be implemented, the certainty that the conservation effort will be implemented and (2) the certainty that the

conservation effort will be effective. Because the certainty of implementation and effectiveness of formalized conservation efforts may vary, we will evaluate each effort individually. In order for us to determine that a formalized conservation effort contributes to making listing a species unnecessary or contributes to forming a basis for listing a species as threatened rather than endangered, the conservation effort must meet the following criteria.

A. The certainty that the conservation effort will be implemented:

1. The conservation effort; the party(ies) to the agreement or plan that will implement the effort; and the staffing, funding level, funding source, and other resources necessary to implement the effort are identified.
2. The authority of the party(ies) to the agreement or plan to implement the conservation effort and the legal procedural requirements necessary to implement the effort are described.
3. Authorizations (e.g., permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty that the party(ies) to the agreement or plan that will implement the effort will obtain these authorizations is provided.

4. The level of voluntary participation (e.g., by private landowners) necessary to implement the conservation effort is identified, and a high level of certainty that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation is provided (e.g., an explanation of why incentives to be provided are expected to result in the necessary level of voluntary participation).

5. All regulatory mechanisms (e.g., laws, regulations, ordinances) necessary to implement the conservation effort are in place.

6. A high level of certainty that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding is provided.

7. An implementation schedule (including completion dates) for the conservation effort is provided.

8. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

B. The certainty that the conservation effort will be effective:

1. The nature and extent of threats being addressed by the conservation effort are described.

are stated.

3. The steps necessary to implement the conservation effort are identified.

achievement of objectives, and standards for these parameters by which progress will be measured, are identified.

on compliance with the implementation schedule) and effectiveness (based on evaluation of quantifiable parameters) of the conservation effort are provided.

These criteria should not be considered comprehensive evaluation criteria. The certainty of implementation and effectiveness of a formalized conservation effort may factors. We will consider all appropriate factors in evaluating formalized conservation

efforts. The specific circumstances will also determine the amount of information necessary to satisfy these criteria.

In addition, we will consider the estimated length of time that it will take for a formalized conservation effort to remove or reduce threats to the species. In some cases, the nature, severity, and/or imminence of threats to a species may be such that a conservation effort cannot be expected to remove or reduce threats quickly enough to make listing unnecessary.

An agreement or plan may contain numerous conservation efforts, not all of which are sufficiently certain to be implemented and effective. Those conservation efforts that are not sufficiently certain to be implemented and effective cannot contribute to a determination that listing is unnecessary or a determination to list as threatened rather than endangered. To determine that a formalized conservation effort contributes to making listing a species as threatened or endangered unnecessary, or contributes to forming a basis for listing as threatened rather than endangered, we must find that the conservation effort is sufficiently certain to be implemented and effective so as to contribute to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis. The elimination or adequate reduction of section 4(a)(1) threats may lead to a determination that the species does not meet the definition of threatened or endangered, or is threatened rather than endangered.

Additional Considerations

Federal agencies, State and local governments, Tribal governments, foreign governments, businesses, organizations, or individuals contemplating development of an agreement or plan should be aware that, because the Act mandates specific timeframes for making listing decisions, we cannot delay the listing process to allow additional time to complete the development of an agreement or plan. Nevertheless, we encourage the development of agreements and plans even if they will not be completed prior to a final listing decision. Such an agreement or plan could serve as the foundation for a special rule under section 4(d) of the Act, which would establish only those prohibitions necessary for the conservation of a threatened species, or for a recovery plan, and could lead to earlier recovery and delisting.

In addition, we encourage the development of agreements or plans even if they do not meet the criteria listed in this policy. We hope that efforts contained in such plans would be implemented by the time we must make a listing decision. If efforts have been, or will be, implemented by the time we must make a listing decision, there is no need to provide certainty of implementation. However, prior to making a listing decision, we would evaluate the certainty of effectiveness of any newly implemented efforts.

If we make a decision not to list a species or to list the species as threatened

rather than endangered based in part on the contributions of a formalized conservation effort, we will monitor the status of the species and the progress in implementation of the conservation effort. If there is (1) a failure to implement the conservation effort in accordance with the implementation schedule; (2) a failure to achieve objectives; or (3) a failure to modify the conservation effort to adequately address an increase in the severity of a threat, we will reevaluate the status of the species and consider whether initiating the listing process is necessary. Initiating the listing process may consist of designating the species as a candidate species and assigning a listing priority, issuing a proposed rule to list, issuing a proposed rule to reclassify, or issuing an emergency listing rule.

Public Comments Solicited

We request comments on four aspects of this notice: (1) The content of the draft policy; (2) other related issues; (3) the clarity of this notice; and (4) the collection of information from the public expected to be associated with preparation and submission of conservation agreements and plans and with monitoring and reporting the implementation progress and effectiveness of conservation efforts, which requires Office of Management and Budget (OMB) approval under the Paperwork Reduction Act.

Comments on the Content of the Draft Policy

especially interested in your comments on the criteria that we will use to evaluate the certainty that a formalized conservation effort will be implemented. For example, implement a conservation effort actually be in place in order for us to determine that the effort contributes to making listing a species unnecessary or contributes to forming that the conservation effort include a high level of certainty that the regulatory mechanisms will be adopted by a specified date? Similarly, should funding, is evaluated, or is it sufficient that the conservation effort include a high level of certainty that they be in place by a specified date? In addition, how might an entity determining a final action on this draft policy, we will take into consideration all comments we receive during the comment period.

Also, we are interested in your comments on the timing of the development of conservation agreements or plans. We encourage early development of conservation before the time a species is placed on the candidate list. However, agreements or

plans often have been initiated or accelerated when one of the Services has proposed to list a species. Listing proposals generally provide a 60-day comment period. At the latest, we should receive conservation agreements or plans before the end of the comment period in order to be considered in a final listing decision. Beginning development of a conservation agreement or plan after the species is proposed for listing generally does not allow much time for implementation of any new conservation efforts identified as necessary in an agreement or plan. In that case, we must rely on our analysis of the certainty of implementation and effectiveness of those proposed efforts when making a listing decision. We hope that, by identifying specific criteria for evaluation of conservation efforts, this policy will encourage earlier development of conservation efforts such that many of the identified conservation efforts will be implemented by the time a final listing decision is made. Are there other ways to encourage earlier development of conservation efforts?

Clarity of the Policy

Executive Order 12866 requires agencies to write regulations that are easy to understand. We invite your comments on how to make this policy easier to understand, including answers to the following questions: (1) Is the discussion in the “Supplementary Information” section of the preamble helpful in understanding the policy? (2) Does the policy contain technical language or jargon that interferes with its clarity? (3) Does the format of the policy (grouping and order of sections, use of

headings, paragraphing, etc.) aid or reduce its clarity? (4) What else could we do to make the policy easier to understand?

Send your comments concerning the content or clarity of this draft policy to the FWS (see ADDRESSES section).

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13; 44 U.S.C. 3501 et seq.) requires Federal agencies to obtain OMB approval for certain collections of information from the public. We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number. Simultaneous to publication of this notice, we are requesting OMB approval for information collection associated with this draft policy. The OMB regulations implementing provisions of the Paperwork Reduction Act require agencies to provide interested members of the public and other affected agencies an opportunity to comment on agency information collection and recordkeeping activities (see 5 CFR 1320.11). Our request for approval from OMB for a collection of information from the public must include an estimate of the information collection and recordkeeping burden that would result from our draft policy if made final.

The development of a conservation agreement, conservation plan, management

plan, or similar document by a State or other entity is completely voluntary. While this policy applies to formal conservation efforts developed with or without a specific intent to influence a listing decision and with or without the involvement of the Services, only those agreements or plans developed to influence a listing decision, with the involvement of the Service, constitute a new information collection requiring OMB approval under the Paperwork Reduction Act. In addition, when a State or other entity develops such an agreement or plan with the specific intent of making listing of a species unnecessary, the criteria identified in our draft policy can be construed as requirements placed on the development of the agreement or plan. In other words, a State or other entity must satisfy these criteria in order to obtain and retain the benefit they are seeking, which is making listing of a species as threatened or endangered unnecessary.

In addition, one of the criteria identified in our draft policy is that a provision must be included that provides for monitoring and reporting the progress and results of implementation of a conservation effort. Conservation professionals have long considered monitoring and reporting to be an essential component of scientifically sound agreements and plans and routinely incorporate monitoring and reporting into these agreements and plans. We included a monitoring and reporting criterion in this policy to ensure consistency with sound biological and conservation principles and for completeness. Although monitoring and reporting provisions are already generally included in agreements and plans, this criterion also constitutes a new information

Estimating the amount of work associated with developing a conservation agreement or plan with the intent of making listing unnecessary and with monitoring

difficult because: (1) The development (and associated monitoring) of conservation efforts is completely voluntary, and we cannot predict who will decide to develop

conservation efforts and, therefore, cannot predict the nature and extent of conservation efforts and monitoring included in agreements and plans; and (3) many

other laws or for other purposes, and we cannot predict whether, or the extent to which, some of these plans may be expanded to attempt to make listing unnecessary.

developing conservation agreements or plans and monitoring and reporting of conservation efforts on information from conservation agreements developed in the

A. Fish and Wildlife Service

Since 1994, the FWS has entered into approximately 60 conservation

species as threatened or endangered unnecessary. Based on this information, we have entered into an average of about 15 agreements per year, 3 or 4 of which have made listing unnecessary. We expect that these averages will remain stable or increase. We will estimate that annually six agreements will be developed with the intent of making listing unnecessary, that four of these will be successful in making listing unnecessary, and, therefore, in four cases, the States or other entities who develop these agreements will carry through with their monitoring commitments in order to keep the covered species from being listed.

We estimate that each agreement developed with the intent of making listing unnecessary will require an average of 320 person-hours to complete. This estimate is a one-time burden for each plan developed. The burden to six States or other entities who choose to develop an agreement in a given year totals approximately 1,920 hours.

We estimate that, for each conservation effort, the State or other entity will spend annually an average of 160 person-hours to conduct the monitoring and 40 person-hours to prepare a report. Therefore, the annual burden to four States or other entities to complete monitoring and reporting totals approximately 800 hours.

B. National Marine Fisheries Service

Since 1997, NMFS has entered into three conservation agreements, all of

which we determined at the time contributed to making it unnecessary to list the covered species as threatened or endangered. We are assuming that at least one agreement will be developed annually with the intent of making listing unnecessary, and that about half of these will be successful in making listing unnecessary. We estimate that each agreement developed with the intent of making listing unnecessary will require an average of 320 person-hours to complete. This is a one-time burden for each plan developed. Therefore, the burden to one State or another entity that chooses to develop an agreement in a given year totals about 320 hours.

For each conservation effort, the State or other entity will spend an average of 160 hours to conduct the monitoring and 40 hours to prepare a report. Therefore, the annual burden to a State or another entity to complete monitoring and reporting totals about 200 hours. Over the next 3 to 5 years, we anticipate that two States or entities will have agreements in place that will require monitoring and reporting. Therefore, the monitoring and reporting requirement will total about 400 hours each year.

The Service will submit a request to OMB for approval of this collection of information concurrent with the proposed rulemaking action. We are also soliciting comments on this information collection approval request. We invite comments on:

- (1) Whether the collection of information is necessary for the proper performance of our functions, including whether the information will have practical utility;
- (2) the accuracy of our estimate of the information collection burden;
- (3) ways to enhance the

quality, utility, and clarity of the information we would collect; and (4) ways to minimize the burden of the information collection on respondents, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send your comments on specific information collection requirements to the Desk Officer for the Interior Department and Commerce Department, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

OMB has up to 60 days to approve or disapprove information collection but may respond after 30 days. Therefore, to ensure consideration, you should submit your comments concerning information collection to OMB at the above address by [insert date 30 days from date of Federal Register publication].

Required Determinations

Discussion

The Endangered Species Act specifies the process by which the Services can list species as threatened or endangered. The Endangered Species Act requires the Services, when considering whether to list a species, to take into account “those

efforts, if any, being made by any State . . . or any political subdivision of a State . . . to protect such species.” Such conservation efforts are often formalized in conservation agreements, conservation plans, management plans, or other similar documents and are often developed with the specific intent of making listing a species as threatened or endangered unnecessary. Sometimes these agreements or plans are not fully implemented or their results are not fully achieved at the time the Services must make a listing decision. Also, these agreements or plans sometimes rely on future voluntary participation by private landowners, as opposed to enacted protective legislation or regulations. When an agreement or plan has not been fully implemented, its results have not been fully achieved, or it relies on future voluntary conservation efforts, the Services must assess the likelihood that the efforts will be implemented and effective. This policy identifies criteria that a conservation effort must satisfy to ensure certainty of implementation and effectiveness and for the Services to determine that the conservation effort contributes to making listing a species unnecessary or contributes to forming a basis for listing a species as threatened rather than endangered. The Services developed this draft policy to ensure consistent and adequate evaluation of agreements and plans when making listing decisions and to help States and other entities develop agreements and plans that will be adequate to make listing species unnecessary.

The development of an agreement or plan by a State or other entity is completely voluntary. However, when a State or other entity voluntarily decides to

develop an agreement or plan with the specific intent of making listing a species unnecessary, the criteria identified in this policy can be construed as requirements placed on the development of such agreements or plans; the State or other entity must satisfy these criteria in order to obtain and retain the benefit they are seeking which is making listing of a species as threatened or endangered unnecessary.

The criteria in this policy primarily describe elements that are already included in conservation efforts and that constitute sound conservation planning. For example, the criteria requiring identification of responsible parties, required authorizations, and objectives and inclusion of an implementation schedule and monitoring provisions are essential for directing the implementation and affirming the effectiveness of conservation efforts. These kinds of “planning” requirements are generally already included in conservation efforts and do not establish any new implementation burdens. Rather, these requirements will help to ensure that conservation efforts are well planned and, therefore, increase the likelihood that conservation efforts will ultimately be successful in making listing species unnecessary.

Other criteria require demonstrating certainty of implementation and effectiveness of conservation efforts. We have always considered the certainty of implementation and effectiveness of conservation efforts when making listing decisions. However, we have not had explicit evaluation criteria in the past. Consequently, some of our listing decisions involving consideration of conservation

efforts have been challenged in the courts. We believe the criteria in this policy do not exceed the requirements expressed in some recent court decisions and are consistent with the requirements of the Endangered Species Act. Therefore, we believe that there will be no economic effects resulting from compliance with the criteria in this policy by States and other entities.

Furthermore, publication of this policy will have positive effects by informing States and other entities of the criteria we will use in evaluating formalized conservation efforts when making listing decisions, and thereby helping States and other entities develop voluntary formalized conservation efforts that will be successful in making listing unnecessary. Therefore, we believe that there will be informational benefits of issuing this policy. We believe these benefits, although important, will be insignificant economically.

Regulatory Planning and Review. This document is not a significant rule subject to Office of Management and Budget review under Executive Order 12866. The Services believe that an economic analysis is not needed because this is interpretive guidance that does not prescribe or prohibit any public activity and has insignificant economic effects (see Discussion above).

a. This draft policy will not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units

of government.

b. This draft policy will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

c. This draft policy will not raise novel legal or policy issues.

Regulatory Flexibility Act. The Department of Interior certifies that this draft policy will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The Services expect that this draft policy will not result in any significant additional expenditures by entities that develop formalized conservation efforts (see Discussion above).

Small Business Regulatory Enforcement Fairness Act. This draft policy is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The Services expect that this draft policy will not result in any significant additional expenditures by entities that develop formalized conservation efforts (see Discussion above).

Unfunded Mandates Reform Act. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, et seq.):

a. The Services have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The Services expect that this draft policy will not result in any significant additional expenditures by entities that develop formalized conservation efforts (see Discussion above).

b. This draft policy will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings. In accordance with Executive Order 12630, this draft policy does not have significant takings implications. While State or local governments may choose to directly or indirectly implement actions that may have personal property implications, they would do so as a result of their own decisions, not as a result of this policy. This policy has no provision that would take private property rights.

Federalism. In accordance with Executive Order 13132, this draft policy does not have significant Federalism effects. The draft policy will not have a substantial direct effect on the States, on the relationship between the States and the Federal Government, or on the distribution of power and responsibilities among the various

levels of government. Because the draft policy will inform States of the criteria the Service will use to ensure consistent and adequate evaluation of formalized conservation efforts, States will be better able to voluntarily develop effective formalized conservation efforts that make listing species as threatened or endangered under the Endangered Species Act unnecessary.

Civil Justice Reform. In accordance with Executive Order 12988, this draft policy does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. With the guidance provided in the draft policy, requirements under section 4 of the Endangered Species Act will be clarified to entities that voluntarily develop formalized conservation efforts.

National Environmental Policy Act. We have analyzed this draft policy in accordance with the criteria of the National Environmental Policy Act (NEPA) and the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)). This draft policy does not constitute a major Federal action significantly affecting the quality of the human environment. The Service has determined that the issuance of the draft policy is categorically excluded under the Department of the Interior's NEPA procedures in 516 DM 2, Appendix 1 and 516 DM 6, Appendix 1. The National Oceanic and Atmospheric Administration (NOAA) has determined that the issuance of this policy qualifies for a categorical exclusion as defined by NOAA 216-6 Administrative Order, Environmental Review Procedure.

Section 7 Consultation. The Service has determined that issuance of this draft policy will not affect species listed as threatened or endangered under the Endangered Species Act, and, therefore, a section 7 consultation on this draft policy is not required.

Government-to-Government Relationship With Tribes. In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, this draft policy does not directly affect Tribal resources. The effect of this draft policy on Native American Tribes would be determined on a case-by-case basis with individual evaluations of formalized conservation efforts. Under Secretarial Order 3206, the Service will, at a minimum, share with the entity that developed the formalized conservation effort any information provided by the Tribes, through the public comment period or formal submissions, and advocate the incorporation of conservation efforts that will restore or enhance Tribal trust resources. After consultation with the Tribes and the entity that developed the formalized conservation effort and after careful consideration of the Tribe's concerns, the Service must clearly state the rationale for the recommended final decision and explain how the decision relates to the Service's trust responsibility. Accordingly:

- a. We have not yet consulted with the affected Tribe(s). This requirement will be addressed with individual evaluations of formalized conservation efforts.

b. We have not yet treated Tribes on a government-to-government basis. This requirement will be addressed with individual evaluations of formalized conservation efforts.

c. We will consider Tribal views in individual evaluations of formalized conservation efforts.

d. We have not yet consulted with the appropriate bureaus and offices of the Department about the identified effects of this draft policy on Tribes. This requirement will be addressed with individual evaluations of formalized conservation efforts.

Dated: _____

Director, Fish and Wildlife Service

~~(Announcement of Draft Policy for Evaluation of Conservation Efforts When Making
Listing Decisions)~~

Dated: _____

Assistant Administrator for Fisheries

National Oceanic and Atmospheric Administration

~~(Announcement of Draft Policy for Evaluation of Conservation Efforts When Making
Listing Decisions)~~